

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 11,040

IN THE MATTER OF:

Served December 27, 2007

Application of TRANSCOM, INC., for a Certificate of Authority -- Irregular Route Operations)))	Case No. AP-2007-192
Application of TRANSCOM, INC., for Temporary Authority -- Irregular Route Operations)))	Case No. AP-2007-193
VICAR LIMOUSINE SERVICE, INC., WMATC No. 357, Investigation of Violation of Regulation No. 62-02)))	Case No. MP-2007-236
Formal Complaint of SHIRLINGTON LIMOUSINE & TRANSPORTATION, INC., WMATC No. 259, Against TRANSCOM, INC.))))	Case No. FC-2007-001

Transcom, Inc., has applied for a certificate of authority to transport passengers in irregular route operations between points in the Metropolitan District, restricted to transportation in vehicles with a seating capacity of less than 16 persons only, including the driver. Transcom also has applied for temporary authority to transport passengers in irregular route operations between points in the Metropolitan District, restricted to transportation in vehicles with a seating capacity of less than 16 persons only, pursuant to a contract with the U.S. Department of Homeland Security.

The applications are opposed by Shirlington Limousine & Transportation, Inc., WMATC No. 259, and Executive Technology Solutions, LLC, WMATC No. 985.

Pursuant to Rule No. 20-02, the applications are being consolidated with the above captioned investigation and complaint inasmuch as all four proceedings involve or bear on the question of Transcom's fitness for operating authority.

I. BACKGROUND

This is Transcom's third application for operating authority. Transcom was granted operating authority in 2000, but the issuance of a certificate of authority was expressly made contingent on Transcom filing additional documents within thirty days.¹ Transcom failed to

¹ See *In re Transcom, Inc.*, No. AP-00-81, Order No. 6053 (Dec. 4, 2000) (conditionally granting Certificate No. 582).

file the necessary documents in a timely manner, thereby voiding the Commission's approval.²

Transcom re-applied for operating authority in 2005. Transcom proposed providing service under a contract with the United States Bureau of Immigration and Customs Enforcement (ICE) using sedans and minivans with a seating capacity of less than 10 persons each, including the driver. The application was accompanied by a motion to dismiss on the grounds that service under the ICE contract met the definition of "bona fide taxicab service" in Regulation No. 51-09 and thus was exempt from the Commission's licensing jurisdiction pursuant to Article XI, Section 3(f), of the Compact. The Commission disagreed³ and assessed a civil forfeiture against Transcom for operating the ICE contract without a WMATC certificate of authority.⁴ To avoid breaching the ICE contract while the application was pending, Transcom entered into a subcontract and lease arrangement with Vicar Limousine Service, Inc., WMATC Carrier No. 357, requiring Vicar to perform Transcom's ICE contract using sedans and drivers supplied by Transcom.

Transcom's application for a certificate of authority was subsequently approved subject to Transcom's payment of the forfeiture within thirty days and to Transcom serving a one year period of probation.⁵ Approval also was conditioned on Transcom filing certain documents within 180 days.⁶ Transcom timely paid the forfeiture and requested an extension of time to comply with the document filing requirement. The document filing extension was denied without prejudice to Transcom's right to file a new application.⁷

II. ORDER OF CLARIFICATION

The instant applications are accompanied by pleadings styled a Motion to Dismiss and an Amended Motion to Dismiss (Amended Motion). The Amended Motion seeks a determination of whether sedan and minivan service under a new Transcom contract with ICE's parent agency, the Department of Homeland Security (DHS), meets the definition of "bona fide taxicab service" in Regulation No. 51-09. Dismissal, however, is not among the relief requested. Accordingly, Commission Order No. 10,902, served November 9, 2007, directed Transcom to clarify whether it is seeking dismissal of both applications or just a determination that the service under the DHS contract is bona fide taxicab service, for which temporary authority would not be necessary.

² See *id.* (grant of authority void upon Transcom's failure to timely satisfy conditions of issuance); Commission Regulation No. 66 (failure to comply with conditions of grant within 180 days voids approval).

³ *In re Transcom, Inc.*, No. AP-05-113, Order No. 9907 (Sept. 13, 2006).

⁴ *In re Transcom, Inc.*, No. AP-05-113, Order No. 10,114 (Nov. 30, 2006).

⁵ See *Id.* (conditionally granting Certificate No. 582).

⁶ *Id.*

⁷ *In re Transcom, Inc.*, No. AP-05-113, Order No. 10,638 (July 18, 2007).

III. INVESTIGATION OF VIOLATION OF REGULATION NO. 62-02

As noted above, Transcom entered into a lease arrangement with Vicar that enabled Vicar to perform Transcom's ICE contract using sedans and drivers supplied by Transcom. The lease would not have been legal without a waiver of Regulation No. 62-08, which generally prohibits a WMATC carrier from leasing drivers and vehicles from the same source.⁸ Such a waiver was granted during the course of Transcom's second application.⁹ But no waiver of Regulation No. 62-02 was granted. That regulation stipulates that during the term of any lease filed by a WMATC carrier:

The motor vehicle(s) named in the contract of lease shall be operated by, and under the complete control of, the lessee, and no other, for the entire period of the lease, and for all regulatory purposes including insurance, rates, and charges, vehicle identification, and motor vehicle fuel and road taxes, such motor vehicle(s) shall be considered as the vehicle(s) of the lessee. (emphasis added).

An inquiry directed to Vicar's insurance broker reveals that Vicar has not reported to its insurers any of the vehicles identified in the Transcom lease. Accordingly, Order No. 10,902 directed Vicar to show cause why it should not report the Transcom-leased vehicles to Vicar's insurers or cease operating them.

IV. TRANSCOM'S & VICAR'S RESPONSE

Transcom responds that it is not seeking dismissal of its applications. Vicar has not responded.

V. TRANSCOM'S APPLICATIONS

Under Title II of the Compact, Article XI, Section 13(a), the Commission may grant temporary authority if there is an immediate need for service that is not available. As discussed below, Transcom has entered into a DHS subcontract and lease arrangement with Vicar. Inasmuch as Vicar is performing the service, we cannot find that such service is unavailable.¹⁰

The Compact, Title II, Article XI, Section 7(a), authorizes the Commission to issue a certificate of authority if it finds that the proposed transportation is consistent with the public interest and that the applicant is fit, willing, and able to perform the proposed transportation properly, conform to the provisions of the Compact, and conform to the rules, regulations, and requirements of the Commission.

⁸ Order No. 10,114.

⁹ *Id.*

¹⁰ *In re Ruchman & Assocs., Inc., t/a RAI, Inc.*, No. AP-91-31, Order No. 3839 (Nov. 4, 1991), *aff'd*, No. AP-91-32, Order No. 3844 (Nov. 13, 1991).

An application for a certificate of authority must be in writing, verified, and in the form and with the information that Commission regulations require.¹¹ Commission Regulation No. 54 requires applicants to complete and file the Commission's application form. The form itself requires supporting exhibits. The evidence thus submitted must establish a prima facie case of fitness and consistency with the public interest.¹²

Once applicant has made its prima facie case, the burden shifts to protestant to contravene applicant's showing.¹³ If the protestant is an existing carrier, the burden is on protestant to show that competition from the applicant would adversely affect protestant to such a degree or in such a manner as to be contrary to the public interest.¹⁴ The protest must be accompanied by all available evidence on which the protestant would rely.¹⁵

Applicant proposes performing government contracts with sedans and minivans. Applicant verifies that: (1) applicant owns or leases, or has the means to acquire through ownership or lease, one or more motor vehicles meeting the Commission's safety requirements and suitable for the transportation proposed in this application; (2) applicant owns, or has the means to acquire, a motor vehicle liability insurance policy that provides the minimum amount of coverage required by Commission regulations; and (3) applicant has access to, is familiar with and will comply with the Compact, the Commission's rules, regulations and orders, and Federal Motor Carrier Safety Regulations as they pertain to transportation of passengers for hire.

We find that applicant has complied with Regulation No. 54 and has established thereby a prima facie case of fitness and consistency with the public interest.

VI. PROTESTS AND COMPLAINT

The deadline for protests in the temporary authority application was November 5, 2007. The deadline for protests in the certificate of authority application was November 19, 2007. Executive Technology filed a protest to the temporary authority application on November 7 and a protest to the certificate of authority application on November 21. Neither protest is timely. Neither shall be considered.

Shirlington's protests, on the other hand, are timely. The protests level two basic charges: that Transcom has been illegally performing the DHS contract since October 29, 2007, and that Transcom has permitted Vicar to continue operating the ICE contract with

¹¹ Compact, tit. II, art. XI, § 8.

¹² *In re City Sightseeing Buses LLC*, No. AP-06-013, Order No. 9651 (June 15, 2006).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Commission Regulation No. 54-04(a).

Transcom vehicles even though, Shirlington contends, the Commission's waiver of Regulation No. 62-08 expired when the 2005-2007 application proceeding terminated earlier this year.

Shirlington's complaint charges, apparently in the alternative, that Transcom is currently performing the ICE contract. The complaint also charges that Transcom is illegally performing a contract with the Transportation Security Administration (TSA).

A. ICE Contract

Commission records show that Transcom and Vicar have continued the ICE subcontract and lease arrangement authorized by the Commission in Order No. 10,114, served November 30, 2006. The issue raised by Shirlington is whether that authorization survived the proceeding in which it was issued. We hold that it does.

The Commission has approved other subcontract and lease arrangements of the type entered into by Transcom and Vicar and approved by this Commission in Order No. 10,114.¹⁶ This insures that service to the agency is not interrupted and, at the same time, legal. Such arrangements are in the public interest. While it may not be in the public interest to permit such arrangements indefinitely,¹⁷ the record shows that the reason for Transcom's failure to satisfy the terms of last year's conditional grant - a lack of for-hire license plates - has since been remedied. Thus, there should be no reason why Transcom should not timely satisfy all conditions this time.

Further, although Order No. 10,114 noted that approval of the subcontract arrangement was being granted while Transcom's application was pending - and indeed the Order does assume that Transcom would consummate that particular application - the subcontract approved by the Commission had an expiration date of October 1, 2007, which was well past the May 30, 2007, deadline for Transcom to satisfy the conditions of the grant and obtain its certificate of authority.

Commission records also show that Transcom and Vicar have renewed the ICE subcontract and corresponding lease.

B. DHS Contract

Commission records show that Transcom and Vicar have entered into a DHS subcontract and lease arrangement similar to the ICE subcontract and lease agreement, effective October 29, 2007. Hence,

¹⁶ See *In re Applied Business Management Solutions, Inc (ABMSI) LLC*, No. AP-07-112, Order No. 10,733 (Sept. 5, 2007); *In re Zohery Tours Int'l, Inc.*, No. AP-07-053, Order No. 10,602 (July 5, 2007); *In re Executive Tech. Solutions, LLC*, No. AP-04-084, Order No. 8725 (May 19, 2005); *In re VGA, Inc.*, No. AP-03-073, Order No. 7496 (Oct. 29, 2003). We have noted in the past that government contracts present unique issues requiring special procedures. See *In re Regulation No. 70*, No. MP-79-04, Order No. 2004 (June 20, 1979) (amending application procedures).

¹⁷ See Order No. 10,902 (requiring Transcom to comment on same).

the evidence of record is that Vicar is performing the DHS contract, not Transcom.¹⁸

C. TSA Contract

In the 2005-2007 application proceeding, the Commission noted the existence of Transcom's TSA contract and directed Transcom to file a copy.¹⁹ Transcom complied. Examination of the TSA contract reveals a per-trip rate structure for transportation between points in the Washington Metropolitan Area, much like the rate structure in the ICE contract. The contract calls for service both inside and outside the Commission's jurisdiction.²⁰ Transcom summarized the per-trip activity under this contract that occurred before Transcom filed the 2005 application. Although that activity was slight, Order No. 9907, served September 13, 2006, should have directed Transcom to cease and desist performing the TSA contract, at least as to that portion within our jurisdiction. Now that Shirlington has brought this to our attention, we will direct Transcom to cease and desist performing the TSA contract in this order.

D. Request for Oral Hearing

Shirlington requests an oral hearing to take the testimony of Transcom employees.

Prior to 1991, the Compact required the Commission to issue a certificate to an applicant upon finding "after hearing held upon reasonable notice" that the applicant was fit and that the proposed transportation was required by the public convenience and necessity.²¹ The Compact was amended in 1990, effective 1991,²² largely to eliminate the oral hearing requirement and to substitute a public interest test for the public convenience and necessity test.²³ Today, oral hearings on applications for operating authority are the exception, not the rule.²⁴

Requests for oral hearing in an application proceeding are governed by Commission Regulation No. 54-04(d), which states that: "A request for oral hearing must state the reason for the request, describe the evidence to be adduced, and explain why such evidence cannot be adduced without an oral hearing."

¹⁸ As explained below, we find that the DHS contract is subject to our licensing jurisdiction.

¹⁹ *In re Transcom, Inc.*, No. AP-05-113, Order No. 8882 (Aug. 3, 2005).

²⁰ One per-trip rate is for service in the "DC Area within Beltway." One is for service between points in Virginia. One is for service to/from Baltimore Washington International Thurgood Marshall Airport. The latter two are outside our jurisdiction.

²¹ *In re Washington Shuttle, Inc.*, t/a SuperShuttle, No. AP-96-013, Order No. 4996 (Jan. 8, 1997).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

Shirlington's request does not describe the nature or content of the testimony it would adduce from Transcom's employees or otherwise explain what the testimony would establish. The request also fails to explain why the testimony could not be adduced by deposition and why the facts Shirlington would establish can only be established through the testimony of Transcom's employees.

The request shall be denied.

E. Conclusion

In consideration of the foregoing, the protest and relief requested in the complaint are denied, except that Vicar shall be directed to cease and desist operating Transcom's vehicles, as discussed below.

VII. JURISDICTION OVER THE DHS CONTRACT

Transcom contends that the sedan and minivan service under its contract with DHS do not require a WMATC certificate of authority by virtue of Article XI, Section 3(f), of the Compact, which, by reference to Article XI, Section 1(b), excludes from the Compact's certification requirement "taxicabs and other vehicles that perform a bona fide taxicab service." Regulation No. 51-09 defines bona fide taxicab service as follows:

Other vehicles that perform a bona fide taxicab service means vehicles other than taxicabs used to perform a service that is:

(a) transportation intended in good faith to be provided only between points selected at will by the person or persons hiring the vehicle in which such transportation is provided;

(b) conducted in a vehicle subject to the exclusive use of the passenger or single party of passengers hiring the vehicle for the entire time such vehicle is under hire;

(c) priced at rates based on the duration and/or distance of the transportation rendered;

(d) conducted in a vehicle engaged solely in rendering or performing transportation as described in subparagraphs (a), (b), and (c) above; and

(e) conducted in a vehicle having a seating capacity of eight passengers or less in addition to the driver.

"We strictly construe the meaning of ['bona fide taxicab service'] because such service is excluded from the Compact's certification requirements."²⁵ "Bona fide' in the sense of Section 1(c) means genuine and authentic taxicab service. It excludes a service which superficially or occasionally exhibits the

²⁵ In re Seth, Inc., t/a Kids Kab, No. AP-93-40, Order No. 4243 at 3 (Feb. 9, 1994).

characteristics of taxicab service as described above, but in reality is intended for something else."²⁶

The DHS contract appears to meet the criteria in Regulation No. 51-09, although the matter is not entirely free from doubt. The contract calls for exclusive service in vehicles seating nine persons or less between points in the Metropolitan District selected by the agency and/or passengers. The pricing appears to be based on hourly rates. There is a total award amount specified, but it is not clear that the agency is obligated to pay the total award. Nonetheless, we find the resemblance to bona fide taxicab service is merely superficial.

In *In re Rodwell Buckley t/a Elrod Transp. Serv.*, No. 337, Order No. 1749 (Sept. 16, 1977), the Commission held that services under a contract with the District of Columbia Department of Human Resources were not bona fide taxicab service in part because applicants' services were "not held out to the general public on a non-discriminatory basis."²⁷ The DHS contract at issue here clearly does not call for service to the general public. According to the contract, sedan and minivan service is to be provided to senior DHS executives only.²⁸ Furthermore, the contract incorporates numerous Federal Acquisition Regulations that bind Transcom's performance²⁹ and imposes various performance standards that Transcom must meet.³⁰ That is not taxicab service under any definition. Rather, it is contract charter service.

When the Commission adopted the definition of bona fide taxicab service in Order No. 2559, it noted that the difference "between a taxicab service and certain charter services is a matter of degree"³¹ and that "charter service may be, and often is, repetitive."³² The Commission previously had defined contract charter service as follows:

The term "Charter Operation Pursuant to Contract" means the transportation of persons under a single written contract which provides for the exclusive and periodically recurrent use of a vehicle or vehicles to meet the distinct need of the passengers.³³

²⁶ *In re Title II, Art. XII, § 1(c) of the Compact*, No. MP-83-01, Order No. 2559 at 10 (May 24, 1984) (emphasis added).

²⁷ Order No. 1749 at 26.

²⁸ Amended Motion at 2 (citing DHS Contract at 8).

²⁹ DHS Contract at 11-14.

³⁰ DHS Contract, Attachment 8.

³¹ Order No. 2559 at 10.

³² *Id.*

³³ *In re Investigation of Authority to Perform Contract Operations*, No. 234, Order No. 1361 (Oct. 16, 1974).

The Commission even adopted special certification procedures for "employee-type" contract carriers.³⁴ Commission precedent makes clear that Order No. 2559 did not alter the classification of such transportation as charter service.³⁵

Accordingly, we find that the sedan and minivan service described in the DHS contract is not bona fide taxicab service.

Our holding is limited to the facts presented here. A different result might obtain if such service is performed with licensed taxicabs,³⁶ if the passengers pay for the service,³⁷ or if the passengers include non-employees.³⁸

VIII. CONCLUSION

Based on the evidence in this record, and in consideration of the terms of probation prescribed in Order No. 10,114 and reiterated below, the Commission finds that the proposed transportation is consistent with the public interest and that applicant is fit, willing, and able to perform the proposed transportation properly, conform to the provisions of the Compact, and conform to the rules, regulations, and requirements of the Commission.

We also reaffirm that Regulation No. 61 shall be waived with respect to applicant's executive sedans seating nine persons or less, including the driver.

We cannot, however, reaffirm our approval of the lease of Transcom vehicles to Vicar. As noted above, Order No. 10,902 directed Vicar to show cause why it should not report the Transcom-leased vehicles to Vicar's insurers or cease operating them. Also as noted above, Vicar has not responded. Vicar, therefore, shall immediately cease operating Transcom's vehicles.

³⁴ In re Proposed WMATC Reg. No. 70 Concerning Charter Operations Pursuant to Contracts for Employee-Type Transp., No. MP-79-04, Order No. 2004 (June 20, 1979). The procedures were dropped when the 1990 Compact amendments made them obsolete.

³⁵ See *In re Suggs Transp. Servs., Inc.*, No. AP-89-29, Order No. 3432 (Nov. 9, 1989) (granting charter authority to perform limousine and sedan service at hourly rates under short-term government contracts). See also *In re A-1 Transp. Inc.*, No. AP-94-25, Order No. 4370 (Aug. 19, 1994) (granting authority to airline-crew carrier proposing hourly charter service in 6-passenger limousines and 4-passenger sedans).

³⁶ See *In re Silver Spring Taxi, Inc.*, No. AP-78-33, Order No. 1888 (Sept. 28), *aff'd*, Order No. 1923 (Nov. 21, 1978) (repetitive, flat-rate contract service not subject to WMATC licensing jurisdiction because performed with licensed taxicabs).

³⁷ See *In re George's Limo. Serv.*, Order No. 1445 (July 25, 1975) (service under "continuing written contract" with private corporations not contract charter service where passengers pay for service).

³⁸ See *In re Montgomery Charter Serv., Inc.*, No. 18, Order No. 172 (July 20, 1962) (transportation of foreign students in 8-passenger vehicles under contract with private corporation held type of taxicab operation).

THEREFORE, IT IS ORDERED:

1. That Case Nos. AP-2007-192, AP-2007-193, MP-2007-236, and FC-2007-001, are hereby consolidated pursuant to Commission Rule No. 20-02.

2. That the application for temporary authority is denied.

3. That the protests filed in this proceeding and the relief requested in the complaint are denied.

4. That Vicar Limousine Service, Inc., shall immediately cease operating all vehicles leased from Transcom, Inc.

5. That applicant shall immediately cease performing the Transportation Security Administration contract unless and until a certificate of authority has been issued in accordance with this order.

6. That upon applicant's timely compliance with the requirements of this order, Certificate of Authority No. 582 shall be issued to Transcom, Inc., 14905 Finegan Farm Drive, Darnestown, MD 20874.

7. That applicant may not transport passengers for hire between points in the Metropolitan District pursuant to this order unless and until a certificate of authority has been issued in accordance with this order.

8. That applicant is hereby directed to present its revenue vehicle(s) for inspection and file the following documents within the 180-day maximum permitted in Commission Regulation No. 66: (a) evidence of insurance pursuant to Commission Regulation No. 58 and Order No. 4203; (b) an original and four copies of a tariff or tariffs in accordance with Commission Regulation No. 55; (c) a vehicle list stating the year, make, model, serial number, fleet number, license plate number (with jurisdiction) and seating capacity of each vehicle to be used in revenue operations; (d) a copy of the for-hire vehicle registration card, and a lease as required by Commission Regulation No. 62 if applicant is not the registered owner, for each vehicle to be used in revenue operations; and (e) proof of current safety inspection of said vehicle(s) by or on behalf of the United States Department of Transportation, the State of Maryland, the District of Columbia, or the Commonwealth of Virginia.

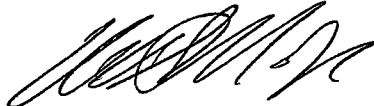
9. That Regulation No. 61 is waived with respect to the executive sedans that pass staff inspection pursuant to the preceding paragraph.

10. That applicant shall be placed on probation for a period of one year commencing with the issuance of Certificate No. 582 in accordance with the terms of this order and that a willful violation

of the Compact, or of the Commission's rules, regulations or orders thereunder, by applicant during the period of probation shall constitute grounds for immediate suspension and/or revocation of applicant's operating authority without further proceedings, regardless of the nature and severity of the violation.

11. That the grant of authority herein shall be void and the application shall stand denied upon applicant's failure to timely satisfy the conditions of issuance prescribed herein.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS YATES AND CHRISTIE:

A handwritten signature in black ink, appearing to read 'W.S. Morrow, Jr.', with a stylized, cursive script.

William S. Morrow, Jr.
Executive Director